Supreme Court, U.S.
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No. 98-1622

In The

Supreme Court of the United States

TERRY MORGAN,

Petitioner,

v.

THE COUNTY OF LAKE, AND THE SUPERIOR COURT IN AND FOR THE COUNTY OF LAKE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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JURISDICTION

Respondents County of Lake and the Superior Court in and for the County of Lake (collectively "County") do not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition seeks to collaterally attack the Ninth Circuit's Opinion below by asserting that the United States Court of Appeals for the Ninth Circuit's Local Rules of Appellate Procedure and the application of those rules denied Petitioner Terry Morgan ("Morgan") due process of law and the equal protection of the law. The petition gives scant attention to the actual arguments of due process and equal protection, disregards the uncontested evidence which the Ninth Circuit Panel (the "Panel") reviewed in making its decision and ignores the flaws in its apparent zeal to criticize the Ninth Circuit.

As Morgan sets forth the procedural history of this case, the County will address the undisputed evidence upon which the Panel based its decision, with particular focus on the established facts demonstrating that Morgan had the right to control the means and manner of her work – the critical factor in the appeal. Before addressing Morgan's due process and equal protection arguments, the County will examine the flawed reasoning of Morgan's collateral attack on the Panel's Decision.

A. Procedural Facts

The petition sets forth an accurate account of the procedural history of this case. Morgan urges that there is a dispute on the facts that should have prevented summary judgment. Petition, p. 6. However, at the time of the District Court's decision, both Morgan and the County filed motions for summary judgment on the employee-independent contractor issue. Both motions were heard simultaneously and each party asserted that the underlying facts were not in dispute and that the decision could be made by the District Court applying the law to the undisputed facts. Petition, p. 5. On appeal, Morgan now claims that there were disputed facts. Petition, p. 6.

B. Substantive Facts

Morgan was employed as a *pro tem* court reporter for the County on 16 sporadic occasions over a three-month period. The *pro tem* reporters were called upon when the regular employee court reporters could not meet the court's needs. Through Morgan's deposition testimony, the County established that Morgan controlled the means and manner of her work as a *pro tem* court reporter. Morgan admitted that she had the right to refuse any offer of work from the County. According to Morgan, the only control the County had over her in regard to her *pro tem* work as a reporter was to tell her when she was needed and when transcript deadlines were approaching; she was responsible for every other aspect of her employment. This was the most significant evidence the County presented to support the motion for summary judgment.

The County presented additional evidence including the facts that Morgan never received employee benefits, she only received an Internal Revenue Service 1099 form marked non-employee at the end of the year, she used her own equipment on the job, she was paid on a *per diem* basis, and Morgan even applied for an employee position with the County during her *pro tem* work.

Based upon the facts presented to the Panel, a Memorandum was filed on December 4, 1998 affirming the District Court's decision.

REASONS FOR DENYING WRIT

A. There is no basis to argue that the unpublished status of the case affected the affirmation of the district court's order

The remedy requested of this Court is to order that the Memorandum be published. Whether or not the Memorandum is published, the Panel has made its decision on the merits, and Morgan's Petition for Rehearing and Suggestion for Hearing En Banc has already been denied. Even if this Court were to order that the Memorandum be published, the Panel's decision would still stand and Morgan would be in no better position. Morgan can appeal the Memorandum whether or not it is published. It would be pointless for this Court to answer the questions Morgan has presented regarding publication of the Memorandum as it would make no difference in the case. *Cf. Martinez v. California*, 444 U.S. 277, 284 (1980) (lack of causation made it unnecessary to decide whether state parole officers could potentially deprive

plaintiff's decedent of a constitutional right by releasing a prisoner on parole.) The petition should be denied on this basis alone.

B. The panel used the appropriate legal analysis and applied the correct state law to the undisputed evidence

1. As the substantive law of California was used to determine whether Morgan was an employee or independent contractor of the County, the panel's decision not to publish the memorandum did not create "secret law" for the State of California

Morgan urges that a body of secret law is being created by the Ninth Circuit when it decides not to publish a decision. Morgan fails to realize that the entire substantive part of the Memorandum was based upon California law, not federal law. There is no allegation that there is such secret law in California. If state law is used for the decision, and there is no claim that Morgan was unaware of the substantive law of the State of California, then Morgan is merely complaining that the Panel misapplied California law to the facts of her case, not that the Ninth Circuit is the repository of a body of secret law. As state law, not federal law, was exclusively used in ruling on the employee-independent contractor issue, there is no basis for this petition.

2. The panel considered the facts presented by the parties and applied the "right to control test" and Second Restatement of agency law in its analysis

The Panel advised the parties in the Memorandum that it was relying on the facts as known by the parties.

See Memorandum, Petition, Apx. A, App. 2[1] The Panel then set forth its decision:

> Based upon the right to control test, and the factors enumerated in the Second Restatement of Agency, we conclude that Morgan was not an employee because she retained the right to control the means and manner of work. *S.B. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal.3d 341, 350, 769 P.2d 399, 404 256 Cal.Rptr. 543, 548 (1989); *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal.3d 943, 949, 471 P.2d 975, 979, 88 Cal.Rptr. 175, 179 (1970).

Memorandum, Petition, Apx. A, App. 2.

Morgan fails to recognize this express statement in the Memorandum. Her suggestion that the Panel failed to use the "right to control test" is without support in the record.[2] The Panel clearly stated that it examined the record, used the "right to control test", and also examined the additional factors enumerated in the Second Restatement of Agency. Morgan's assertion that the Panel did not use the proper criteria is unsupported in the record she puts forth in the petition.

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[1] As set forth above, Morgan's own admissions of her control over her work were contained within the record.

[2] The Panel also referred to the other factors under the Second Restatement of Agency. *See* Memorandum, Petition, Apx. A, App. 2. The Panel did specifically discuss two *additional* factors; Morgan did not receive employment benefits and both parties intended Morgan to be an independent contractor. The Second Restatement of Agency is cited within *S.B. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal.3d 341, 350, 769 P.2d 399, 404 256 Cal.Rptr. 543, 548 (1989).

C. The Ninth Circuit Local Appellate Rules of Court do not violate the due process clause or equal protection clause of the United States Constitution

1. Due process was satisfied as Morgan had notice and an opportunity to be heard

The Court should first examine whether Morgan is entitled to due process under the Fifth Amendment of the United States Constitution at all based upon her claim that the Memorandum should have been published. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260-261 (1987). In this case, Morgan was not entitled to due process.

Morgan claims she was entitled to have the Memorandum published. There is no such requirement, and no authority is identified anywhere in the petition that mandates that it be published. By enacting 28 U.S.C. § 2071, Congress authorized the Courts of Appeal to adopt local rules of practice. The Ninth Circuit, pursuant to § 2071 and the Federal Rules of Appellate Procedure, Rule 47, adopted such local rules, including the United States Court of Appeals for the Ninth Circuit's Local Rules of Appellate Procedure, Rule 36 ("Rule 36"). There is no argument that the court exceeded its powers in adopting local rules. There is no authority for the proposition that Morgan is entitled to have her case published under any statute, rule of law or constitutional provision. This Court does not publish the rationale for denying every Petition for a Writ of Certiorari that is presented. There is no law or constitutional provision requiring this Court to publish its rationale just as no law binds the Ninth Circuit to publish every decision.

The fact of whether a case is published does not deprive Morgan of any property right. She can still

appeal the case if she feels that the Memorandum is incorrect under the law. As Morgan has failed to specify the property right of which she was deprived when the Memorandum was not published, she is not entitled to due process of law.

Assuming *arguendo* that Morgan had a property right that evoked due process of law, she was given notice and an opportunity to be heard on appeal. Whether or not the case was published would not affect Morgan's right to appeal the decision and, therefore, Morgan cannot claim a due process violation. The " 'fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." ' [citations omitted.]" *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987).

It is undisputed that Morgan was given the opportunity to brief her appeal and present the complete record from the District Court, file a reply and given the opportunity to present oral argument to the Panel. Morgan was given notice and an opportunity to be heard. That is all that is required to satisfy due process considerations in this case. The Due Process clause does not require notice, an opportunity to be heard *and* the right to publication.

2. Morgan was not denied equal protection of the laws as Rule 36 is rationally related to legitimate governmental interests

Morgan claims that Rule 36[3] violates the equal protection clause of the Fifth Amendment of the United States Constitution by classifying Ninth Circuit decisions

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[3] *See* Petition, pp. 2-3.

as either appropriate for publication or not appropriate. As Petitioner does not claim, nor could she, that this case involves any "suspect" or "quasi-suspect" classifications, this Court has held that such a "classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. [citations omitted]." *Lyng v. Castillo*, 477 U.S. 635, 639 (1985).

Rule 36 itself sets forth several rational bases for its enactment. Rule 36-2(a)-(g) sets forth the criteria or reasons why a decision should be published. Each reason stated is related to a legitimate governmental interest. For example, one of the governmental interests in publishing a decision is to make available the ruling as precedent when it "(a) Establishes, alters, modifies or clarifies a rule of law." Rule 36-2(a). Decisions which do not meet this requirement are not to be published because they do not meet the rational governmental purpose of establishing new case law precedent.

Another example is found in Rule 36-2(b) which allows a ruling to be published if to do so "calls attention to a rule of law which appears to have been generally overlooked." There is a governmental interest in creating a body of precedent in an area of law which may not yet have a diversity of cases or may not be fully developed. Conversely, areas of the law which have a sufficient number of precedents do not require publication.

Each of the other criteria for publication have similar rational reasons for the creation of a classification of published and unpublished decisions. Morgan has simply

ignored the "rational relationship test." Rule 36-2 explicitly states the reasons for publication of a case and each is rationally related to a legitimate governmental interest.

The petition sets forth another rational reason for the classification of published and non-published cases. The petition states that the Ninth Circuit is by far the busiest circuit handling more cases than any other circuit. According to the petition, the Ninth Circuit publishes only 16.4%[4] of the appeals which it reviews. Petition, p. 10. Out of the 4,337 cases reviewed, only 710 were published leaving 3,627 unpublished decisions. *Id.* The affect of publishing another 3,600 rulings a year would create a heavy burden on court, law libraries and practitioners without a corresponding benefit. As set forth above, Rule 36-2 sets the criteria for publication of decisions: the 3,600 unpublished decisions did not meet this criteria. By increasing the shear volume of published rulings fivefold,

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[4] Morgan cannot claim that the disproportional impact on unpublished decisions is, in and of itself, a violation of equal protection. Even when a suspect classification is involved, this Court has required that there be evidence of purposeful discrimination. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) [analyzed a plaintiff's equal protection claim which challenged a veteran's preference policy favoring men at a rate of 98%.] Notwithstanding the disproportionate impact, this Court found that there was no violation as plaintiff could not show that the classification was adopted to purposefully discriminate against women. *Feeney, supra*, 442 U.S. at 278-79. It is not enough to prove the policy maker could have foreseen the discriminatory effect of a policy. This element requires that the particular policy be adopted "at least in part 'because of', not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

unnecessary time, money and resources would have to be applied without a significant benefit in light of the publication criteria of Rule 36-2.

Furthermore, the court's, public agencies' and private practitioners' resources, time and energy will be wasted in the time it takes to separate controlling authority from non-controlling authority. Logically, five times the effort will be devoted to sifting through text to separate the "wheat from the chaff." The Panel, in deciding a particular case and reviewing the relevant case law, is in the best position to determine whether the case before it is of such significance to justify its inclusion in the body of law that will be reviewed when the next case arises. If the case adds nothing to the existing body of law, then to publish the case will tax and waste public resources. The ramifications of a requirement of publication would be overwhelming on the legal community. In light of the burden of a requirement of publication and the rational reasons set forth in Rule 36-2 for the publication of cases, Rule 36 does not violate the equal protection clause.

D. The panel's decision to not designate the memorandum for publication was not arbitrary and capricious

Rule 36-2 expressly sets forth criteria for publication. This is not a case of an arbitrary system but instead the Ninth Circuit has articulated a set of standards in Rule 36-2. This is not Morgan's complaint. Instead, she argues that the Memorandum fits within the framework of Rule 36-2. The scope of review of such an inquiry is a narrow

one. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

First, Morgan fails to inform the Court that there was no dispute among the parties that the "right to control test" was the most important factor for the court to consider. Both parties cited for authority the cases set forth in the Memorandum: *S.B. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal.3d 341, 350, 769 P.2d 399, 404 256 Cal.Rptr. 543, 548 (1989); *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal.3d 943, 949, 471 P.2d 975, 979, 88 Cal.Rptr. 175, 179 (1970). These cases are 10 and 29 years old and are the controlling authority in the State of California as they set forth the "right to control test." Second, Morgan's case adds nothing to the established law of California and she fails to distinguish the facts of her case as unique. Morgan does not even attempt to fit her case within the criteria of Rule 36-2 except to say that the Panel failed to utilize the "right to control test" and, therefore, the Memorandum affects current California Law. Petition, p. 17. As stated above, the assertion that the Panel applied the incorrect test is not supported by the text of the Memorandum.

Morgan also claims that the Memorandum is of important public interest and should have been published. Petition, p. 18. The discussion of the case is direct and to the point and does not offer exhaustive analysis, which is not warranted in this case, where the facts and law are clear (and undisputed at the cross-motions for summary judgment before the District Court). Morgan fails to set forth a reason why this case is so unique as to qualify for publication. There is no basis for claiming that the Panel's decision to not publish the Memorandum was

arbitrary or capricious. The Panel had a rational basis for not publishing the Memorandum as it adds nothing to the existing state of the law and the facts are not so unusual as to be of significance.

CONCLUSION

Ultimately, Morgan's argument is reduced to a claim that the Panel applied the wrong law to the facts of this case. Morgan will not benefit from publication of this case nor will publication of the case affect the substantive law of the State of California. Morgan's due process and equal protection claims are without support in the record before this Court. Finally, there is no basis for finding that the Panel acted arbitrarily or capriciously in deciding not to publish the Memorandum. For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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